IN THE

Supreme Court of the United States

October Term, 1953

No. 222

CIVIL AERONAUTICS BOARD,

Petitioner,

v.

ARTHUR E. SUMMERFIELD, *Postmaster General of the United States,* and THE UNITED STATES OF AMERICA, on behalf of the Postmaster General,

Respondents.

No. 223

DELTA AIR LINES, INC.,

Petitioner,

v.

ARTHUR E. SUMMERFIELD, *Postmaster General of the United States,* and THE UNITED STATES OF AMERICA, on behalf of the Postmaster General,

Respondents.

BRIEF FOR BRANIFF AIRWAYS, INC., NORTHWEST AIRLINES, INC., AND TRANS WORLD AIRLINES, INC. AS *AMICI CURIAE*

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Opinions Below

The opinion of the Court of Appeals reversing the order of the Civil Aeronautics Board, one judge dissenting, which has not yet been reported, appears at pages 68-72 of the

Transcript of Record. The opinions of the Civil Aeronautics Board, which have not yet been officially printed, appear at pages 6-58 of the Transcript of Record.*

Jurisdiction

The judgment of the Court of Appeals was entered on May 4, 1953 (77). The jurisdiction of this Court is invoked under 28 U. S. C. §1254 and section 1006(f) of the Civil Aeronautics Act of 1938, 52 Stat. 1024, 49 U. S. C. §646(f). The petitions for writs of certiorari were filed on July 31, 1953 and granted on October 12, 1953 (79).

Statute Involved

The pertinent provisions of the Civil Aeronautics Act are set forth in the brief of the Civil Aeronautics Board.

The Questions Presented

1. Does the Board have the power, in fixing a final mail rate for a past period for the international division of an air carrier which rate includes some subsidy, to refuse for important reasons of policy to offset any part of the carrier's domestic revenues earned under a previously fixed final mail rate for the carrier's domestic division, where that rate also included some subsidy?

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* Unless otherwise stated, numbers in parentheses refer to the pages of the Transcript of Record and wherever italics appear they have been added. The Civil Aeronautics Board will sometimes be referred to as the "Board", the *amici* as "Braniff", "Northwest" and "TWA", and the Civil Aeronautics Act of 1938, as amended (52 Stat. 973, as amended, 49 U. S. C. §401) as the "Act".

The Board held that "while we are required to take nto consideration the need of a carrier for mail compensa- ion together with 'all other revenue,' we believe that we are not required by section 406(b) to reduce the carrier's mail pay with any part of such other revenue if there are sound reasons for not doing so as a matter of economic policy." The Board concluded that because such reasons were present in the case, "the earnings from C & S' domes- tic routes should not be used to offset the 'need' resulting from the carrier's international routes" (54-5).

The Court of Appeals reversed, Judge Prettyman dis- senting, because it found that section 406(b) requires the Board to treat a carrier as a single entity and to include as "other revenue" so-called "excess" earnings on domes- tic operations in computing the need of its international operations (71).

2. If the Board did have such power, was it properly exercised in this case?

The Board refused to make the offset because it found in this and other cases that to require unprofitable foreign operations to be supported by domestic profits would

> (1) force domestic carriers to abandon their foreign routes and result in the monopolization of foreign routes by an existing non-domestic carrier, or operation by a new company with inadequate finances and experience, or operation by a surface carrier, all contrary to established national policy and the public interest;
>
> (2) make it impossible to fix uniform domestic class rates under which there will be competitive incentive for efficient domestic operations; and

(3) cause further, if not permanent, delay in the fixing of final mail rates which the Board concluded are needed to provide an incentive for efficient air carrier operations.

The Court of Appeals did not consider whether these were proper factors to be taken into consideration in determining whether to make the offset, because of its holding as to the Board's lack of power. However, the dissenting judge agreed with the Board's decision stating, 'It seems to me that the intermingling of foreign and domestic factors in the computation of each separate rate would lead to great confusion and to inaccuracy in supposedly separate results'' (76).

3. Does the Board have the power, under any circumstances, to refuse for important reasons of policy to offset part of a carrier's domestic earnings under a final subsidy-free mail rate, in fixing mail rates for the international division of the carrier?

The Court of Appeals did not expressly relate its decision to the peculiar facts of the case before it—where both the domestic and international divisions of the carrier were receiving a subsidy mail rate. Subsequently, the Postmaster General has urged the application of the Court of Appeals decision in mail rate cases involving carriers whose domestic mail rate was completely free of subsidy. *Delta Airlines, Inc. Mail Rates, Latin American Operations,* C. A. B. Docket No. 6110, Serial No. E-7738, pp. 6-15 (September 21, 1953); *Braniff Final Mail Rate* case, (domestic

operations) (C. A. B. Docket No. 5142, Serial No. E-7815 (October 13, 1953).*

While the Postmaster General, in cases involving the *amici* now pending before the Board, is insisting on this expanded application of the Court of Appeals decision, the respondents in this case have indicated that the Court should limit its decision to the peculiar facts of the instant case. The opening sentence in "Memorandum for the Postmaster General and the United States of America", filed in this Court October 27, 1953, reads as follows:

> "These petitions present the question whether section 406(b) of the Civil Aeronautics Act . . . requires the Civil Aeronautics Board, in fixing past subsidy mail pay for the international division of an air carrier, *to offset the carrier's excess subsidy earnings from its domestic operations.*"

Amici submit that if this Court should affirm, its decision should be expressly limited to the factual situation

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* See also *Transatlantic Final Mail Rate Case*, C. A. B. Docket No. 1706, et al., Brief to the Examiner on Behalf of the Postmaster General, p. 12 (July 3, 1953):

> "It is, of course, recognized that in the case of TWA the excess earnings of its domestic division were realized during a period when the carrier was operating under a final future mail rate determined to be subsidy-free or, as commonly designated, a service rate. To that extent there is a distinction between the C & S Case; C & S's domestic division realized excess earnings while operating under a final future subsidy rate. The Department does not believe that the fact that TWA operated under a service rate is of such a distinguishing nature with respect to TWA as to warrant a conclusion different from that reached by the Court in the Chicago and Southern Case."

here presented. The Board's power to refuse to offset under other circumstances and especially where a carrier receives no domestic subsidy, should either be recognized or left for future decision.

Statement of the Case

The facts of the case are stated in the brief of petitioner Delta. Here we will set forth those additional facts which will help explain the presence of *amici* in this case.

Amici, as well as petitioner Delta, are air carriers engaged in transporting persons, property and mail by aircraft within the United States and to foreign points under certificates of public convenience and necessity issued under the Act by petitioner Civil Aeronautics Board. Domestically, Northwest and TWA operate transcontinental routes stretching across the United States, while Braniff and Delta operate routes principally through the Middle West and South. Under separate international certificates, Northwest operates across the Pacific, TWA across the Atlantic, Braniff to South America and Delta through the Caribbean.*

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* All of these routes were certificated by the Board after approval by the President under section 801 of the Act. In addition, Braniff's route was certificated pursuant to a directive from the President under such section: "Because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility, he has reached conclusions which require * * * the extension of an additional carrier to South America as far south as Rio de Janeiro, Brazil, and Buenos Aires, Argentina." *Latin American Air Service* case, 6 C. A. B. 857, 860 (1946).

Delta had no international route prior to the merger with C & S.

On their domestic routes all four of these carriers face substantial competition from other air carriers which operate domestically only, except for "stub-end" routes classified by the Board as part of domestic services for rate making purposes. On their foreign routes *amici* are in competition with foreign airlines and with Pan American World Airways, Inc., the only United States carrier operating exclusively in the international field.* The international operations of *amici* and Delta, because of their distinctive character and extensive nature, have been classified as separate units for rate-making purposes. However, in the case of Northwest, its operations between points in the United States and points in Canada have been included in its domestic operations. See *Northwest Airlines, Inc., Domestic Operations,* C. A. B. Docket No. 3211, Serial No. E-6717, p. 1 (August 21, 1952).** There are no other U. S. air carriers similarly situated to *amici* and *Delta,* and therefore liable to be as directly affected by the decision in this case.

The Board, from its inception, has been primarily concerned with fixing final rates for the future. However, it has found it necessary, at times, because of the delays in-

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* Pan American has an affiliate, Pan American Grace Airways, which also competes with Braniff between the United States and South America.

** Five other U. S. air carriers conduct "stub-end" operations into Canada, Mexico, Cuba and Bermuda, which, like Northwest's Canadian operations, are integrated with and treated as part of their domestic operations. See *National Airlines, Inc.,* C. A. B. Docket Nos. 3037, 3248, Serial No. E-6344, p. 4 (April 21, 1952); C. A. B. Report, *Administrative Separation of Subsidy from Total Mail Payments to United States Air Carriers, September 1953 Revision,* Appendices 6-10.

herent in the mail rate-making procedures, to fix temporary rates for a carrier pending the determination of a final mail rate, which is then made retroactive to the date of the commencement of the mail rate-making proceeding. See *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U. S. 601, 605 (1949). These delays have been appreciably greater in fixing international mail rates than in fixing domestic rates. Thus proceedings are still pending before the Board for the fixing of final international mail rates for TWA and Braniff for the entire period of their international operations—from 1946 in the case of TWA and from 1948 in the case of Braniff. *Transatlantic Final Mail Rate* case, C. A. B. Docket No. 1706 *et al.; Braniff Airways, Inc.—Mail Rates—Latin America Operations,* C. A. B. Docket No. 2886. But their domestic rates for that period and for the future have already been fixed. See, *In the Matter of American Airlines, Inc., et al.,* C. A. B. Docket No. 2849 *et al.,* Serial No. E-5715 (September 19, 1951); *Braniff Airways, Inc. Mail Rates—Domestic Operations,* C. A. B. Docket No. 5142, Serial Nos. E-7780 (October 1, 1953),* E-7815 (October 13, 1953).

In the *Transatlantic Final Mail Rate* case, *supra,* the Postmaster General has demanded that the Board reduce TWA's international mail pay for the past period by offsetting some domestic profits earned in 1951 and 1952, even though TWA received no domestic subsidy for those years and even though TWA's domestic mail rate for those years was finally fixed and cannot be reopened. See *Trans-*

* This tentative decision is still subject to final order of the Board, but Braniff has not objected to the proposed rate, which is a purely service rate without any subsidy element.

continental & Western Air, Inc. v. *Civil Aeronautics Board,* 336 U. S. 601 (1949).

In *Braniff Airways, Inc. Mail Rates—Domestic Operations, supra,* the Postmaster General has demanded that the establishment of Braniff's domestic mail rate for the period on and after October 1, 1951 be stayed until the proceeding involving its international rate is ripe for final determination. Should the decision below be affirmed, Braniff would be faced with the prospect of having its international mail rate offset by domestic profits all the way back to June 1948 when international operations were inaugurated by Braniff, notwithstanding the fact that between June 1948 and October 1951 Braniff's domestic system was operating under closed rates.

Neither TWA nor Braniff had the slightest reason to believe it necessary to set aside domestic profits earned in the past under final mail rates, for the purpose of "offset" against international needs. See *Pennsylvania Central Airlines Corporation, et al.,* 8 C. A. B. 685, 703 (1947) affd. *sub nom. Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 169 F. 2d 893, 336 U. S. 601. As a practical matter, the offset would amount to the recapture of funds already committed to the business of the two carriers or paid out in dividends. The effect of such recapture would seriously disrupt their businesses.*

* As to Northwest, both its international and domestic mail rates have been fixed, except for the year 1951, so that it is not as vulnerable to the recapture of past profits under the Court of Appeals decision as the other *amici. Northwest Airlines, Inc., Domestic Operations,* C. A. B. Docket No. 3211, Serial Nos. E-6717 (August 21, 1952), E-6959 (November 17, 1952); *Northwest Airlines, Inc. Mail Rates—Trans-Pacific Operations,* C. A. B. Docket No. 2539 *et al.,* Serial Nos. E-7079 (January 13, 1953), E-7136 (February 4, 1953).

For the future, *amici* and petitioner Delta will be at a serious disadvantage in competing with their domestic competitors that have no international routes to which the domestic profits may be siphoned off under the decision below.

The mail rates under which Delta and *amici* are operating domestically are devoid of subsidy and are called "service rates." They compensate "the air carriers for carrying the mail, reimbursing them for the related costs, including a fair return on the investment which is used in the mail service." C. A. B. Report, *Administrative Separation of Subsidy from Total Mail Payments to Domestic Air Carriers*, p. 8 (September, 1951). In this report, the Board classified the domestic carriers into seven groups "to reflect their relatively attainable unit costs as determined by the revenue ton-miles per station transported by each carrier" (*id.*, at p. 4). TWA's domestic division, and three other carriers which except for "stub-end" routes operate only domestically, are classified in Group I, which has the lowest service rate. The domestic divisions of Braniff, Northwest and Delta are classified in Group II, together with exclusively domestic carriers, which has a somewhat higher service rate than Group I (*id.*, September, 1953 Revision, Appendices I-V).

As will be shown below, the value of this classification in future rate-making proceedings may be substantially impaired by the decision of the Court of Appeals, since the combined domestic and international operations of Delta and *amici* cannot be properly classified with any other groups of carriers.

Summary of Argument

The Court of Appeals did not challenge the Board's finding that any offset would interfere with the furtherance of the basic objectives of the Act, including the development of economically sound domestic and international air transportation systems and the avoidance of monopolistic control of United States international air transportation.

Instead, the Court held that section 406(b) absolutely forbids the Board to refuse to offset, regardless of how cogent the reasons. It reached this conclusion by focusing on the words "all other revenue of the air carrier" in that section. But that is just one of the elements which the section directs the Board to "take into consideration, *among other factors.*" This Court has previously recognized that such language empowers the administrative agency, after due consideration, to refuse to give any weight to one factor where to do so would interfere with the general scheme of an act and make it impossible to give effect to other and more pressing factors which the statute requires the agency to consider as well. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U. S. 604 (1950).

Moreover, the Court of Appeals decision, if not directly in conflict with this Court's decision in *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U. S. 601 (1949), certainly eliminates much of the practical significance of that decision; for, as the Board has pointed out in the case now pending before this Court and in subsequent cases, under the Court of Appeals decision carriers with domestic and international routes will be subject to a "cost-plus" system of regulation.

POINT I

The Act clearly delegated to the Board the power which the Court of Appeals held nonexistent.

This is the second time this Court has been called upon to determine the power of the Board under section 406 of the Act. In *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U. S. 601 (1949), the Court agreed with the Board that it had no power "to fix a new mail rate for air carriers and to make it retroactive for a period in which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a mail rate proceeding" (336 U. S. at 602, 607).

The reason for that decision was that section 406 "reads like a typical public utility rate-making authority" (604), that there was nothing in the legislative history or scheme of the Act to indicate that it was not meant to be "typical" (605-606), and therefore the Board was right in holding that it could not make so "unprecedented a departure from the conventions of rate-making" (607).

In the current case, respondents challenge the Board's power to exercise a "typical public utility rate-making authority"—the power of the Board to decide, in its discretion, whether to treat separate operations of a carrier independently for the purpose of rate-making. Yet this power is one typically exercised by rate-making agencies. *American Toll Bridge Co.* v. *Railroad Commission of California,* 307 U. S. 486, 494 (1939) affg., 12 Cal. 2d 184, 83 P. 2d 1, 7-8 (Sup. Ct. 1938). As said in *Leeman* v. *Public Utilities Commission of District of Columbia,* 104 F. Supp. 553, 560 (D. C. 1952):

> "Ordinarily, whether a smaller unit should be used as a basis for rate-making is a matter of discretion for the regulatory agency." *

That the separate classification of domestic and international operations is reasonable cannot be disputed since "many considerations which enter into the fixing of an international rate are different from those entering into the establishment of a domestic rate" (20). "Operating problems such as the necessity for special equipment for long over-water flights, customs procedures, problems of currency fluctuation and control, compliance with many and varied foreign laws, dealings and negotiations with foreign governments as well as the State Department, the pressure of foreign flag carrier competition—all characterize international air transportation as a separate class of service." *Delta Air Lines, Inc., Mail Rates, Latin American Operations,* C. A. B. Docket No. 6110 Serial No. E-7738, p. 9 (September 21, 1953).**

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* See also *Wabash Valley Electric Co.* v. *Young,* 287 U. S. 488, 497 (1933); *Interstate Commerce Commission* v. *City of Jersey City,* 322 U. S. 503, 517 (1943); *Boston Consolidated Gas Co.* v. *Department of Public Utilities,* 327 Mass. 103, 110, 97 N. E. 2d 521, 525-26 (Sup. Ct. 1951); *The Five Per Cent* case, 31 I. C. C. 51, 387, 392, 407-408 (1914); *City of Grand Forks* v. *Red River Power Company,* 8 P. U. R. (N. S.) 225, 243 (N. D. Bd. Rd. Comm., 1935); *Re Central Arizona Light & Power Company,* 9 P. U. R. (N. S.) 270, 280 (Ariz. Corp. Comm., 1935); *City of Douglas* v. *Arizona Edison Company,* 1 P. U. R. (N. S.) 493, 498 (Ariz. Corp. Comm., 1933); *Re Detroit Edison Company,* 16 P. U. R. (N. S.) 9, 18-19, (Mich. Pub. Ut. Comm., 1936).

** "It is evident that all of the major foreign airlines here studied have been dependent on public aid in varying degrees and forms." Lissitzyn, *Public Aid to Major Foreign Airlines,* 19 J. Air Law & Commerce, 38, 65 (1952). See also C. A. B. Report, *Administrative Separation of Subsidy from Total Mail Payments to United States International Overseas and Territorial Air Carriers,* pp. 3-5 (June, 1952).

Section 406(b) directs the Board in determining the mail rate to:

> "take into consideration, among other factors, * * * the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service and the national defense."

This is not the language of absolutes. Moreover, the scheme of the Act clearly contemplates the establishment by the Board of reasonable classifications for rate-making and other purposes. Thus the opening sentence of section 406(b) provides that the Board "may fix different rates for different air carriers or classes of air carriers, and different classes of service," and section 416(a) provides that the Board may "establish such just and reasonable classification or groups of air carriers for the purposes of this title as the nature of the services performed by such air carrier shall require."

Indeed, Judge Prettyman's dissent below, after pointing out that "the Board clearly had power to fix different rates for international service and for domestic service" (75), stated that "the 'all other revenue' which [the Board] must 'take into consideration' means revenue related to that service for which the rate is being fixed" (76). And the Board has expressed the same view in a subsequent case involving a similar situation. *Delta Air*

Lines, Inc. Mail Rates, Latin American Operations, C. A. B. Docket No. 6110, Serial No. E-7738, p. 8 (September 21, 1953).

The Court of Appeals focused on the words "all other revenue of the air carrier," and in spite of the other language of sections 406 and 416 found a "plain meaning" depriving the Board of power to consider separately the domestic and international divisions of the carrier, regardless of how cogent the reasons for doing so. But at most, the Act requires the Board "to take into consideration, *among other factors,*" the revenue of the domestic division in fixing a mail rate for the international division. It nowhere compels the Board, after such consideration, to give the domestic revenue any quantitative part in computing the final international rate.

This distinction was pointed out in *Secretary of Agriculture* v. *Central Roig Refining Co.,* 338 U. S. 604 (1950). There the question presented was whether the Secretary of Agriculture obeyed the requirements of the Sugar Act in allotting the amount of sugar individual refiners could import into the United States. The Sugar Act required the allocation to be made by "taking into consideration" three factors. After due consideration, the Secretary concluded that one of these factors could not properly be applied and therefore gave it no weight in his final determination. The Court of Appeals held that the Sugar Act required the Secretary of Agriculture to give "some effect to each" of the three factors. 171 F. 2d 1016, 1019, (C. A. D. C. 1948). This Court reversed and upheld the action of the Secretary, saying (338 U. S. at 611-12):

> "Moreover, he is under a duty merely to take 'into consideration' the particularized factors. The Secretary cannot be heedless of these factors in the sense, for instance, of refusing to hear relevant evidence bearing on them. But Congress did not think it was feasible to bind the Secretary as to the part his 'consideration' of these three factors should play in his final judgment—what weight each should be given, or whether in a particular situation all three factors must play a quantitative part in his computation."

Cf. *McLean Trucking Co.* v. *United States*, 321 U. S. 67 (1944).

Here there is even less reason to "bind" the Board as to the effect to be given one enumerated factor. Section 406(b) also directs the Board "to take into consideration . . . other factors" than those specifically enumerated in that section. These "other factors" obviously include the general policy provisions found in section 2 of the Act, which apply to rate-making as well as to every other function of the Board. *Mid-Continent Airlines, Inc., Mail Rates* 1 C. A. A. 45, 55 (1939).*

The relationship between section 406(b) and section 2 of the Act was also recognized by this Court in *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U. S. 601, 606 (1949).

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* See also *Inland Air Lines, Inc.—Mail Rates*, 1 C. A. A. 155, 157 (1939); *Continental Air Lines, Inc.—Mail Rates*, 1 C. A. A. 182, 188 (1939); *Pan American Airways Company—Mail Rates* 1 C. A. A. 220, 254 (1939); *Pan American Airways Company—Mail Rates*, 1 C. A. A. 529, 544 (1940); *Braniff Airways, Inc.—Mail Rate Proceeding*, 2 C. A. B. 555, 582 (1941); *American Airlines, Inc—Mail Rate Proceeding*, 3 C. A. B. 323, 346 (1942)

These general policy considerations set forth in section 2 of the Act command the Board to consider as in the public interest such factors as the "encouragement and development" of the air transport industry, the regulation of the industry so as to "foster sound economic conditions" and a number of similar factors indicating the broad discretion reposed in the Board.

The decision of the Court of Appeals holds that the Board may not evaluate all the factors expressed by Congress in the Act and decide what weight, if any, to give such factors. Instead, the Court below held that the Board is compelled not only to "consider" one factor to the exclusion of all others, but is also compelled to give that single factor a prescribed quantitative part in its computation of the rate.

The Court of Appeals attempted to support this view by pointing out that in some cases the Board has treated all the operations of an air carrier as a single rate-making unit, citing *Chicago and Southern A. L. Mail Rates—Route No. 8 and 53,* 3 C. A. B. 161, 190 (1941), and *Pan American Airways, Inc., Alaska Mail Rates,* 6 C. A. B. 61, 67 (1944). The Court of Appeals concludes that "Thus we have an established construction of the Act by the Board which should be given weight" (72). What the Court of Appeals refers to as "an established construction of the Act by the Board" was merely an exercise of discretion by the Board in one particular direction. The Board has also exercised its discretion in the other direction. Each case has been judged on its facts. In some cases the Board, after considering all the facts, has decided to treat a carrier's entire operations as one rate-making unit and in other cases it has decided to treat each separate

division of a carrier as a separate rate-making unit.* This has not been inadvertent, but has been done deliberately by the Board. For example, regarding TWA's two divisions, the Board has said:

> "In that order [i.e., order issued in 1945 fixing TWA's domestic rate] we specifically provided that the rate was not to apply to the international operation, for which we subsequently in a separate proceeding fixed a temporary rate. This has the effect of a determination that TWA's domestic and international operations are separate units for rate-making purposes." *Pennsylvania Central Airlines Corporation et al., supra*, 8 C. A. B. 685, 703 (1947) affd., 169 F. 2d 893, 336 U. S. 601.

We are dealing here with an Act which empowers the Board to make subsidy grants in order to effect certain broad statutory objectives. Where the Board has found that it would attain the desired objectives by treating an air carrier as a single rate-making unit it has done so. Indeed, it is the Board's stated policy "to treat the entire operations of a carrier as a single unit for rate-making purposes . . . except in those instances in which the characteristics of different operations made the accomplishment of the objectives of the Act feasible only by treating the different operations as separate rate-making units." *National Airlines, Inc.*, C. A. B. Docket Nos. 3037, 3248, Serial No. E-6344, pp. 2-3 (April 21, 1952).

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* In instances where conditions change, the Board may decide that two divisions of a carrier previously considered as separate rate-making units shall thereafter be considered as a single unit for rate purposes. See *United Air Lines, Inc.*, C. A. B. Docket Nos. 5683, 2913, Serial No. E-6676, p. 2 (August 7, 1952).

Section 406(b) should not be construed to prevent the Board from thus accomplishing the objectives of the Act.*

POINT II

The decision of the Board to exclude domestic revenues was based on appropriate policy considerations and should not be disturbed by the courts.

The Board has found, both in this case and in subsequent decisions, that domestic profits cannot be offset against the needs of the international divisions of air carriers without doing violence to practically all the major policy considerations which the Board is required to take into consideration (55). See also *Delta Air Lines, Inc. Mail Rates, supra,* Serial No. E-7738, pp. 6-15; *Braniff Final Mail Rate* case, *supra,* Serial No. E-7815, pp. 8-9. In the latter case the Board summarized the policy reasons as follows:

> "We pointed out that the national policy, developed over a considerable period of time, required participation by domestic air carriers in international air transportation, and that such policy would be seriously threatened should the domestic air carriers be required to use the profits of their domestic business to subsidize their international operations. We also noted that an offset policy may adversely affect

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* *The Western Air Lines Case* (Nos. 224, 225), consolidated for argument with this case (79, 80), involves the question of the abuse of the Board's discretion rather than its existence. The Court of Appeals held that the Board could not refuse to give any weight to revenues derived from the sale of a route in order to provide an incentive for voluntary route transfers. Whether or not the Court too narrowly viewed the area of the Board's discretion is of no particular significance here on the basic issue of administrative power.

> the possibility of improved domestic service and lower passenger and property rates. We expressed concern that a policy which would require the establishment simultaneously of final rates for domestic and international operations may result in substantially longer periods of 'cost plus' operation and higher rather than lower subsidy payments."

"There may be differences of opinion concerning the weight to be given those factors * * *. But their significance is for the [Board] to determine; and, though we had doubts, we would usurp the administrative function of the [Board] if we overruled it and substituted our own appraisal of these factors." *New York v. United States*, 331 U. S. 284, 349 (1947).

The respondents here seek a ruling which at the moment may seem to be in their interest, without consideration of its significance in different cases where respondents' present contentions may redound against them. See *Re Long Island Lighting Co.*, 18 P. U. R. (N. S.) 65, 213-14 (N. Y. P. S. C., 1935), affd. *sub. nom. Long Island Lighting Company* v. *Maltbie*, 249 App. Div. 918, 292 N. Y. S. 807 (3rd Dept. 1937).

Consider, for example, what would happen under respondents' theory if Chicago and Southern Air Lines had suffered a substantial loss under a final mail rate on its domestic division during the period for which its mail rate for its international division was to be fixed. Under this Court's decision in *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U. S. 601 (1949), the Board would have no power to go back and raise the domestic mail rates. But, under respondents' theory in this case, and the decision below, the Board apparently would be compelled to

give full effect to that domestic loss by increasing the mail rate which would otherwise be fixed for the international division, if that division was considered by itself.

A situation very like this exists with respect to fixing TWA's mail rate for its international division in the pending *Transatlantic Final Mail Rate Case*, C. A. B. Docket No. 1706 *et al.* During the period for which a final past international mail rate is to be fixed in that case, February 5, 1946 to December 31, 1952, TWA contends its domestic division earned a return of about 5.2% on its investment, yet 7% is the rate of return normally allowed by the Board in fixing domestic mail rates for past periods. Under respondents' theory, TWA may seek to have the mail rate for its international division covering that period fixed high enough to account for this 2% deficiency.*

It is interesting to observe that a primary cause of this low domestic return was a 32.38% loss on investment suf-

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* In his brief to the Examiner in the *Transatlantic Final Mail Rate Case*, the Postmaster General suggests offsetting the return in excess of 8% earned by TWA on its domestic routes in 1951 and 1952, and completely ignores the prior years when TWA reported a lesser return or suffered a loss. But he does not suggest how such a one-sided view could be justified.

The record in that case (p. 4236) shows the following colloquy between counsel for the Postmaster General and TWA's counsel.

"Mr. Brahm [Counsel for the Postmaster General]: Pending the decision of the Court the Department of course maintains its position, that in determining the subsidy mail pay of one division of a carrier's operation, the Board must offset any excess earnings realized from another division.

"Mr. Rowe [Counsel for TWA]: Does that apply to deficiencies in the past periods as well?

"Mr. Brahm: I was speaking of excess earnings."

fered by TWA in 1946, which prompted TWA's unsuccessful effort to have its domestic mail rate for that year retroactively increased. See *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board, supra.* Thus, what this Court held the Board could not do directly, it is now asked to hold the Board may do indirectly.

Consider further a situation where a carrier with domestic and international routes earns less than forecast under a final mail rate fixed for its international route. Under the decision below, such a carrier could apparently seek to make up the difference in a pending domestic mail rate proceeding. In short, under the decision below, mail rates for such carriers may never be finally closed and a cost-plus system of rate-making will prevail, in spite of this Court's decision in *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board, supra.*

Why, then, do *amici* seek a reversal? First, because the decision introduces an unfair and improper element of chance in the businesses of *amici.* It proposes to take away domestic profits in excess of a certain level accruing during the period the international rates may be open. This would be especially harmful to a carrier which has had a long succession of domestic losses over a period of years, but whose domestic business took a favorable turn and showed good profits during the years for which international rates are to be fixed.

This is a very real problem in the air transport industry which lacks the stability of the more usual forms of public utilities. The Board has pointed out that "there have been substantial variations in airline earnings over the his-

tory of the industry. Although for certain periods they have been what might be considered excessive, over the entire period the average return has not been *prima facie* unreasonable." and "better than average earnings are required in good times to offset less than average earnings in poor times." *General Passenger Fare Investigation, etc.*, C. A. B. Docket No. 5509, Serial No. E-7376, p. 9 (May 14, 1953).

Thus, the application of the offset would depend on the particular point in the business cycle that a mail rate proceeding was commenced. A carrier operating both domestic and international routes could find all the high points of its domestic earnings cycle leveled off by offsets against international losses, with no means of filling in the valleys in domestic earnings occurring in poor years. In every instance where the Postmaster General has alleged "excess" domestic earnings, the claimed amounts are not excesses over any extended period of time, but represent the peaks occurring in a few isolated years during which the air carrier attained better than average earnings. The Postmaster General's position means that where profits are above average they accrue to the government; below-average earnings and losses are to be borne by the carrier.

Second, the decision below imposes an unfair burden on carriers engaged in both domestic and international operations. Domestic carriers which operate international routes are in vigorous competition domestically with other carriers engaged exclusively in domestic air service and whose domestic earnings would not be subject to offset against international losses. TWA, which receives the lowest domestic service rate prescribed by the Board, a

rate devoid of any subsidy, competes with three other large domestic carriers being paid the same mail rate. The purpose of such a uniform rate is to provide incentive, a fact this Court recognized in *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board, supra,* 336 U. S. at 606-07:

> "Section 406 (b) authorized the Board to fix rates for 'classes of air carriers.' It is plain that the uniform rate for the class is an important regulatory device * * *. A uniform rate forces carriers within a given class to compete in securing revenue and in reducing or controlling costs."

The Board establishes uniform class rates in the domestic field by grouping in one class all of those carriers whose domestic routes are comparable. As previously mentioned, the Board has classified the domestic operations of the nation's carriers into seven groups, and has determined a service rate for each of those groups. For example, in proposing a final mail rate for Braniff, whose domestic operations are in Group II, the Board said:

> "it is proposed to fix a rate of 53 cents per mile-ton of mail as the fair and reasonable rate of compensation for Braniff on and after October 1, 1951. This rate, developed by the Board for administrative purposes as the compensatory rate for Group II cariers, including Braniff, was first set forth in the Board's report entitled 'Administrative Separation of Sudsidy From Total Mail Payments To Domestic Air Carriers' (September 28, 1951) . . . It is the Board's view that the rates shown in the separation report are sound and, at the present time, represent fair and reasonable compensatory rates of mail compensation." *Braniff Airways, Incorpo-*

rated, Domestic Operations, C. A. B. Docket No. 5142, Serial No. E-6257, pp. 8-9 (March 26, 1952). Accord, *Northwest Airlines, Inc., Domestic Operations,* C. A. B. Docket No. 3211, Serial No. E-6717, p. 8 (August 21, 1952).

In theory all carriers in the same group have the same opportunity, they receive the same incentive, and the relative success or failure of each carrier in the group is dependent on its individual initiative in developing revenue and minimizing expense in its domestic service.

But under the Court of Appeals decision equal opportunity would no longer exist because a carrier with both domestic and international routes would have a risk not imposed on other domestic carriers. Carrier A, engaged solely in domestic operations, gets the full return offered to domestic carriers; carrier B, operating purely an international service, is entitled to what it can earn as an international carrier; but carrier C, operating both types of routes and in direct competition with A and B (although perhaps smaller than either), must be satisfied with something less than A and B.

The relative success or failure of C's domestic route under such circumstances would not be the result of its initiative in its domestic operations, but would be substantially determined by the extent to which the carrier was called upon to make up deficiencies in international mail need. Therefore, such a carrier could no longer be grouped with purely domestic carriers and the fixing of mail rates by classes would, for all practical purposes, be impossible.

Finally, the doctrine advocated by respondents will weaken, if not destroy, the incentive for domestic carriers

to continue in international operations.* Consider, for example, the present situation of Braniff which competes internationally with Pan American World Airways and Panagra and domestically with American Airlines on the Chicago-Dallas route. American is appreciably larger than Braniff and operates no system of international routes (other than trans-border "stub-end" routes). American's domestic earnings are, and will be, available for possible reduction in rates on its domestic system and for the acquisition of more deluxe equipment, or for any other competitive attractions which Braniff could not afford if its domestic earnings must first be used to offset losses on its international services. Moreover, effective competition would not be possible if Braniff's passenger and cargo rates were higher than American's, or if Braniff were unable to match any reduction in rates which American might offer to the public. What has been stated above with respect to Braniff applies equally to Northwest, TWA and petitioner, Delta, which also compete domestically with large carriers whose operations are confined to the domestic field.

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* "It is not through happenstance that, with the exception of Pan American and Panagra, all United States international air transportation service is rendered by carriers which also operate domestic divisions. Rather, this is the result of a long and arduous policy development participated in by all branches of the Government. Having adopted the policy that the objectives of the Act, the national interest and the public convenience and necessity would best be served by a system of regulated competition in international air transportation in contrast to the so-called 'chosen instrument,' similar considerations have moved the Government to adopt the policy of certificating domestic carriers to perform international services." *Delta Air Lines, Inc. Mail Rates, Latin American Operations*, C. A. B. Docket No. 6110, Serial No. E-7738, p. 10; see also *"Survival in the Air Age,"* a Report by the President's Air Policy Commission, pp. 118-19 (January 1, 1948).

These, then, are some of the factors which led *amici* to intervene in this case and which led the Board to refuse, in the exercise of its discretion, to make the offset. As it cannot be said that "the balance" the Board "struck on consideration of all the factors" is one "that a fair-minded tribunal with specialized knowledge" could not have reached, the Board's decision should be affirmed. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U. S. 604, 614 (1950).

CONCLUSION

The judgment of the Court of Appeals should be reversed and the orders of the Board affirmed.

Respectfully submitted,

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